Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 212-7035
Toll-free within Ontario:
1-888-618-8846

Web Site: www.wsiat.on.ca

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél. : (416) 314-8800
Téléc. : (416) 326-5164
ATS : (416) 212-7035
Numéro sans frais dans les limites de l'Ontario : 1-888-618-8846

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Ontario

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Quarterly Production and Activity Report

July 1 to September 30, 2010

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Production Summary

- At the end of the third quarter 2010, the active inventory totalled 3,891. This represents the eighth consecutive quarter where the level has remained relatively stable. During this period, the inventory has fluctuated very little (+/- 5%) as compared with its current level.

- Incoming appeals numbered 1012, of these 880 were appeals from WSIB decisions and 132 appellants advised they were ready to proceed to hearing following a period of inactive status.

    - This compares to 902 new appeals and 120 reactivated appeals recorded in the second quarter of 2010.
    - In the 3rd quarter of 2009, the Tribunal recorded 800 new appeals and 157 reactivations.
    - In 2009, the weekly average of hearing ready appellants was 59. For Q3 2010, the weekly average of hearing ready appellants is 54. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 916. This includes 313 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 603 after hearing dispositions; of the after hearing dispositions, 574 followed from Tribunal decisions.

- At the end of Q3-2010, the inactive inventory was 3,216 cases (at the end of Q2-2010, the inactive inventory was 3,275 cases).

- In Q3-2010, 85% of final decisions were released within 120 days. In 2009, 85% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2010, the notice inventory included 1,335 dormant cases, the active inventory totalled 3,891 cases, and the inactive inventory totalled 3,216 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q1-2008	4532
Q2-2008	4227
Q3-2008	4047
Q4-2008	4008
Q1-2009	3914
Q2-2009	3842
Q3-2009	3909
Q4-2009	3831
Q1-2010	3866
Q2-2010	3863
Q3-2010	3891

B. Incoming Appeals

Period	Incoming Appeals
Q1-2008	930
Q2-2008	920
Q3-2008	832
Q4-2008	969
Q1-2009	1002
Q2-2009	992
Q3-2009	957
Q4-2009	945
Q1-2010	1037
Q2-2010	1022
Q3-2010	1012

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2008	1173	386	787
Q2-2008	1213	375	838
Q3-2008	1025	299	726
Q4-2008	1028	267	761
Q1-2009	1056	347	709
Q2-2009	997	341	656
Q3-2009	970	337	633
Q4-2009	1060	367	693
Q1-2010	1018	327	691
Q2-2010	943	319	624
Q3-2010	916	313	603

D. Inactive Inventory

Period	Inactive Inventory
Q1-2008	4068
Q2-2008	4086
Q3-2008	4060
Q4-2008	3818
Q1-2009	3697
Q2-2009	3594
Q3-2009	3481
Q4-2009	3390
Q1-2010	3321
Q2-2010	3275
Q3-2010	3216

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2008	1233	-125
Q2-2008	1245	12
Q3-2008	1232	-13
Q4-2008	1212	-20
Q1-2009	1251	39
Q2-2009	1318	67
Q3-2009	1238	-80
Q4-2009	1201	-37
Q1-2010	1185	-16
Q2-2010	1267	82
Q3-2010	1335	68

Judicial Review Activity

Third Quarter 2010

The status of applications for judicial review involving the Tribunal for the third quarter of 2010 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. Decisions Nos.893/06 (October 12, 2006) and 893/06R (November 15, 2007)

The worker's short term earnings were calculated based on his earnings of $25.00 an hour, with no deductions, at the time of the injury. His average earnings were reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue Agency through his income tax returns. The worker appealed to the Tribunal, alleging that his earnings should continue to be based on $25.00 an hour.

The Vice-Chair denied the appeal. He found the worker to be a "non-permanent employee" within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker's application for reconsideration.

The worker retained counsel and commenced an application for judicial review. The Tribunal filed its Record of Proceedings. The worker then discharged his lawyer. The worker filed his factum and a certificate of perfection. The Tribunal filed its responding factum. It was originally scheduled to be heard in June, but due to a scheduling issue at the Ottawa Divisional Court the proposed date was changed to the week of November 8. This case will be heard in the French language.

2. Decisions Nos.832/04 (November 18, 2004) and 832/04R (April 5, 2007)

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal was denied. The Vice-Chair noted the worker's pre-existing back condition, and the absence of any medical support for the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence.

The worker commenced an application for judicial review. The worker has filed an affidavit alleging that comments made by the Vice-Chair prior to the hearing constitute an apprehension of bias.

The Tribunal has served and filed its record, and both parties' factums have been served and filed. This French language judicial review will be heard in Ottawa during the week of November 8.

3. Decision No.1766/09 (September 29, 2009)

The worker was denied entitlement for chronic pain and LOE benefits after July 2001 by the Board. Her appeal to the Tribunal was granted, the Vice-Chair holding that the worker has entitlement to chronic pain, entitlement to partial wage loss benefits from April 2001 to June 27, 2002, and full LOE benefits from June 27, 2004, to August 23, 2004. The Board was directed to determine if there was ongoing LOE entitlement after August 23, 2004.

The employer served an application for judicial review in December 2009. The Tribunal noted that the worker had not been named as a party in the application. Following discussions, the applicant's counsel took steps to add the worker as a party. The Tribunal then filed its Record. The worker is participating as a co-respondent with the Tribunal.

All parties have filed their factums. This judicial review is scheduled to be heard in Toronto on November 17.

4. Decisions Nos.1110/07I (May 16, 2007), 1110/07 (September 12, 2008) and 1110/07R (March 10, 2009)

The worker appealed for entitlement for interstitial lung disease and for polymyocitis, which she alleged were conditions that resulted from her workplace exposure as a nurse. The Tribunal Vice-Chair sought the opinion of a Tribunal assessor, who was a respirologist with expertise in interstitial lung disease. The Vice-Chair reviewed the medical evidence and concluded that while an association with work was possible, on the balance of probabilities it was not likely that her condition arose from work and more likely it was idiopathic in origin.

The worker commenced an application for judicial review. The Tribunal served its Record of Proceedings. Over five months after the judicial review was commenced, the worker served the Tribunal with her Record and Factum. Given the delay in serving the Tribunal, the worker requested the Tribunal's consent to an order allowing an extension of time to file her Record and Factum with the Divisional Court. The Tribunal consented to the order. The Tribunal also agreed to file its factum within 30 days of the order. At the end of the quarter, counsel for the worker was still amending his materials.

The worker included two new affidavits in her materials that were not part of the Tribunal's Record. The Tribunal has notified the worker that it intends to bring a motion to have the affidavits struck when the judicial review is heard on December 8th.

5. Decisions Nos.1007/08 (May 9, 2008) and 1007/08R (October 20, 2008)

The worker, a police officer, was granted entitlement for a neck and back/shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability award. He injured his low back in 1986, for which he was granted two weeks of benefits. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a

permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for:

1) ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury;
2) entitlement to a pension assessment for a stomach ulcer and stomach surgery from the 1979 injury;
3) a pension award for neck and shoulder injury under the 1979 injury;
4) an increase in the 10% pension award for his back and shoulder from the 1979 injury;
5) a pension assessment for a back condition from the 1986 injury.

The worker's appeal was denied. The Vice-Chair found that there was no ongoing entitlement for a shoulder and neck injury, and no entitlement for a pension assessment from the 1975 accident. The medical evidence indicated there were no ongoing problems that were related to this accident.

Similarly there was no entitlement to a pension for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and infrascapular left shoulder remained appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review, arguing all above issues except for issue #2. The respondent employer police department is participating as a co-respondent with the Tribunal.

All parties have filed their materials. The employer has also requested that the Court dismiss the judicial review on the grounds of delay. The judicial review will be heard in February 2011.

6. Decisions Nos.565/09 (December 8, 2009) and 565/09R (March 9, 2010)

In this right to sue case, a husband and wife shared driving duties in a transport truck. The wife was involved in a single vehicle accident. She and her husband were both injured, her husband sustaining severe injuries. Two insurance companies both brought section 31 applications for declarations that the husband and wife had their right to sue taken away under the Act. The husband had died by the time of the Tribunal hearing and his estate was a respondent. His wife was the other respondent.

The Vice-Chair found the right of action of both husband and wife was taken away, as they were both workers employed by a Schedule 1 employer and in the course of employment at the time of the accident. The husband's estate applied for reconsideration and this was denied.

The husband's estate commenced an application for judicial review of the Tribunal's decisions. The Tribunal and one insurance company are co-respondents. There is some uncertainty about whether the wife and the other insurance company will be parties in the judicial review. The Tribunal and the insurance company have filed responding factums. The judicial review will be heard in Sudbury in March 2011.

7. Decisions Nos.774/09 (April 21, 2009) and 774/09R (August 20, 2009)

This was a section 31 application to determine whether the right of action of the plaintiffs was taken away under the Act. The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. At the end of the quarter the Tribunal was awaiting the plaintiff/applicant's factum.

8. Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)

The worker appealed to the Tribunal for an increase to his long term earnings basis from May 2000 to January 2003, and for a change to the Board's finding of a suitable employment or business (SEB) which had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision, alleging the calculation of his long term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, his short term earnings should have been higher, and taking issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short term earnings because there

was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker attempted to file an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who commenced an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court by the worker, but the application materials became muddled. The Ottawa Divisional Court had set a date for the judicial review to be heard on February 17, but after discussions it was agreed the judicial review would be adjourned on consent. Counsel for the worker failed to abide by a timeline in the consent order to have the materials submitted by a specific date. Through another apparent error the case was scheduled to be heard the week of November 8, even though the correct materials had not been filed in accordance with the court order. As a result of further representations to the Administrative Judge for the Ottawa Divisional Court, it was ordered that the judicial review not go ahead during the week of November 8.

9. Decisions Nos.1248/98 (November 13, 2003) and 1248/98R (October 11, 2007)

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self represented. The Tribunal filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the Tribunal's co-respondent took no position on the request. The Court granted the request and the worker had until the end of June 2009 to perfect the judicial review application. He failed to perfect in time. In March 2010 the worker served the Tribunal with a Notice of Abandonment.

The next day the Tribunal was advised by the Divisional Court Office that the worker had changed his name, and filed a new judicial review application. The new application was the same as the one he had just abandoned, except that the worker now identified himself under his new name.

The co-respondent has indicated that it will bring a motion to strike the worker's new judicial review application. The Tribunal will be supporting that motion. As the worker indicated he was not available until November, the motion is scheduled to be heard in November. In July, the worker served a handwritten notice of abandonment of the latest judicial review, but despite repeated requests he has failed to file it with the Divisional Court. It therefore appears that the motion to strike will go ahead in November.

10. Decisions Nos.1509/02 (February 2, 2004) and 1509/02R (September 27, 2006)

Two sisters were suspended at the same time for smoking in a non-smoking area at work. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005, the Divisional Court unanimously dismissed the application for judicial review. The Court stated, "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001, ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision. The judicial review remains adjourned pending the further Tribunal decision on entitlement for the recurrence. The Tribunal hearing has been scheduled for October.

11. Decisions Nos.1976/99I (November 30, 1999), 1976/99 (December 12, 2002) and 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

The Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker suffered from a work injury, the medical reporting did not relate her condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggests another intervening cause of her disability.

The worker commenced an application for judicial review. However she was represented by a paralegal from Quebec, who would not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. However her factum is improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. At the end of the quarter the Tribunal's concern was being reviewed by the Administrative Judge for the Ottawa Divisional Court.

12. Decisions Nos.1233/08 (June 9, 2008), 1233/08R (May 29, 2009) and 1233/08R2 (April 6, 2010)

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, Decision 1233/08R2. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is still on hold.

Recent Decisions

Third Quarter 2010

LOE and Workers Over Age 65

The worker in *Decision No. 1418/10* was 66 years old at the time of the compensable injury. He did not lose time from work until two and a half years later when he had surgery for his injury. He requested LOE benefits for the time off work due to his surgery. The Vice-Chair denied LOE, finding there was no ambiguity in the wording of section 43(1) which states that when a worker is 63 years old or older on the date of the injury, there is only entitlement for two years from the date of injury. It was clear that the legislature intended to limit LOE benefits paid to older workers. The section could have referred to two years from the date of entitlement to LOE benefits, but it did not. The merits and justice provision of the Act and Board policy does not permit a departure from the clear wording of the legislation. There was no discretion in the Act that would permit section 43(1)(c) to be disregarded.

Implications of Deeming Workers with Zero NELs to Have No Impairment

Decision No. 672/10 concerns a worker who was awarded a 14% NEL for a 2000 low back injury, when she already had a 15% pension for a prior low back injury. The Board followed its policy of subtracting the 15% pension from the 14% NEL, leaving the worker with a 0% NEL for the 2000 accident. Section 47(13) of WSIA provides that the worker is deemed not to have a permanent impairment if the permanent impairment is determined to be zero. The Act also provides LOE is payable until the worker is no longer impaired as a result of the injury. Since the worker had no permanent impairment, the worker was no longer impaired and not entitled to LOE. Because there was no LOE entitlement, the worker also was not entitled to labour market reentry services under the Act.

Earnings Basis of Volunteer Firefighters

Decision No. 747/10 addresses the calculation of earnings basis for LOE benefits for volunteer firefighters. The municipality, a Schedule 2 employer, selected $65,600 as the level of coverage for its volunteer firefighters pursuant to section 78(3) WSIA. The Board used this amount to calculate the worker's earnings basis. The employer argued that using this amount would result in overcompensation and that the worker's actual earnings should be used in this case.

The Vice-Chair did not accept the that section 78(3) only applied to Schedule 1 employers, as the section referred to a general concept of a "deemed employer," and not to either a Schedule 1 or 2 employer. Accepting the employer's argument would lead to the result that the section applied to neither Schedule. As remedial legislation WSIA should be given such fair, large and liberal interpretation as best ensures the attainment of its objects. Any ambiguity in the interpretation of social welfare legislation should be resolved in the claimant's favour. The Vice-Chair agreed with prior case law which held that the Act recognizes the unique circumstances of volunteer firefighters and that their relationship with a municipality when they are injured is distinct from a traditional worker/employer relationship. Section 78(3) was enacted to compensate volunteer firefighters against the inherent risks undertaken in their duties as well as promoting volunteerism in these services. The level of coverage selected by the municipality was to be used for the earnings basis.

Upholding the "Historic Trade-Off" in Right to Sue Applications

Decision No. 201/10 emphasizes the importance of upholding the historic trade-off and discusses the policy values represented by that trade-off. The worker was fatally injured in a mining accident and the Tribunal considered arguments including that the employers were criminally negligent and therefore should not be protected from civil action.

The Vice-Chair noted that no charges had been laid, and no statutory or other authority was cited. She inferred this was basically a policy argument that no one should profit from their own wrongdoing. There were, however, significant policy reasons that lead to the development of the no-fault scheme. The Supreme Court of Canada has held that in right to sue applications, decision-makers have the task of monitoring the system to ensure that the historical trade-off is not undermined. The bar against actions is central to the scheme. The scheme's integrity would otherwise be compromised as employers would seek to have their industries exempted from paying premiums for insurance that did not, in fact, provide them with insurance. While employers and co-workers who are criminally negligent may be subject to other sanctions (e.g. prosecution, experience rating penalties), it was not the Legislature's intention that the Tribunal should decide right to sue applications by determining levels of negligence.

October 2010